IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.811 OF 1998

IN

ARBITRATION PETITION NO.25 OF 1996

IN

AWARD NO.241 OF 1995

The Municipal Corporation of
Greater Bombay. ...Appellant.

vs.

1.M/s.Aban Construction Pvt.Ltd. ...Respondent.

Mr.U.J.Makhija with R.D.Dhanuka & K.N.Gaikwad, for Appellant.

Mr.K.M.Jawle, for Respondent.

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 27th August,2007.

P.C.:-

1. By this appeal, the appellant Corporation challenges the order dated 12.12.1997 passed by the learned Single Judge of this Court in Arbitration Petition no.25 of 1996. By that order, the objections raised to the Award passed by the learned Arbitrator, were dismissed by the learned Single Judge. The objections were raised by the present appellant. By the Arbitration Petition no.25 of 1999, the appellant Corporation has raised objections to the Award no.241 of 1995 dated 23.2.1995. By that Award, the Arbitrator had directed the Municipal Corporation to pay certain amounts to the respondent. Perusal of the Award shows that the claim before the learned Arbitrator was that the Respondent-Contractor was claiming the amount in respect of dewatering done by the respondent as an extra item under the Contract for the period from 1.5.1991 to 31.3.1992. During the course of hearing of this appeal, an affidavit has been filed on behalf of the Corporation of one

Mr.Bhimji Keshavji Rathod, the Executive Engineer. In that affidavit, it is the claim of the Corporation that the entire payment for dewatering for the period from 1.5.1991 to 31.3.1992 which is the period to which the Award relates, has actually been paid by the Corporation to the Contractor, and it is also claimed by the Corporation that the payment was made separately for dewatering. The learned Arbitrator has also held that for that period, the Corporation is liable to make payment separately for the dewatering. This Award has been confirmed by the learned Single Judge. In view of the affidavit of the Corporation, in our opinion, the controversy does not remain whether for dewatering separate payment was liable to be made by the Corporation for the period from 1.5.1991 to 31.3.1992. We are saying this because we do not find it to be the case of the Corporation that though for the period from 1.5.1991 to 31.3.1992 the Contractor was not entitled to separate payment for dewatering, the payment has actually been made to him and that

the Corporation is entitled to claim refund of the amount. In our opinion, therefore, in view of the stand taken by the Corporation that dewatering as an item was actually separately paid for the period from 1.5.1991 to 31.3.1992 in relation to which even the claim of refund was not made by the Corporation, it is not necessary for us to go into the question whether the learned Arbitrator was justified in making the Award and thereby making the Corporation liable to make payment for dewatering as separate item for the period from 1.5.1992 till 31.3.1992, because as indicated above, even according to the Corporation, the Corporation has made said payment. The only controversy that remains between the parties so far as the period from 1.5.1991 till 31.3.1992 is concerned, whether the payment for that period has actually been made and whether because the payment for that period has actually been made the learned Arbitrator was justified in giving direction to the Corporation to make that payment again. In our opinion, as this is a pure question of fact, and as

admittedly that was not raised at any time before, it will not be appropriate to decide that question in this proceedings.

2. We have been informed that the Arbitration for the subsequent period between the same parties in relation to the same contract is pending before the Arbitrator. The learned Counsel appearing for both the sides have therefore, agreed that the Corporation can be permitted to raise the question that as they have already made payment for dewatering as separate item for the period from 1.5.1991 till 31.3.1992, the Contractor is not entitled to recover anything under the Award dated 23.2.1995 from the Corporation in relation to dewatering for the period from 1.5.1991 till 31.3.1992. The learned Counsel appearing for Contractor has no objection to the Corporation being allowed to raise such a plea before the learned Arbitrator Shri.H.Suresh before whom, we have been informed, the seventh Arbitration proceedings is presently pending. The learned Counsel appearing for Contractor has also

fairly stated before us that in case such a claim is raised, he will contest that claim on merit and will not raise any technical objection. It is agreed between the parties that in case the learned Arbitrator holds that payment for dewatering as separate item has actually been made by the Corporation from 1.5.1991 till 31.3.1992, nothing will be payable by the Corporation to the Contractor under the Award dated 23.2.1995. The appeal is, therefore, disposed of in the above terms.

3. It is common ground that the amount, in relation to which this Award has been made which is the subject matter of this appeal, has been deposited by the Corporation in this Court and the Contractor has withdrawn the amount after furnishing bank guarantee. It is directed that the Contractor shall continue to renew the bank guarantee till the question is decided by the learned Arbitrator pursuant to this order and the disposal of the amount and the bank guarantee shall be governed by the order that may be made

by the learned Arbitrator. It is also agreed that the Contractor shall continued to keep the bank guarantee current as it exists today in the name of the Prothonotary and Sr.Master of this Court.

(D.K.DESHMUKH, J.)

(J.H.BHATIA,J.)